DIGEST OF IMPORTANT DECISIONS

REPORTED DURING APRIL, 1893.

EDITED BY

ALFRED ROLAND HAIG.

ADMIRALTY.

Cases selected by HORACE L. CHEYNEY.

MARITIME LIENS.

1. *Supplies—Home Port.*

The statute of Michigan (How. Ann. St., § 8236) provides: "That every water craft above five tons burthen, used or intended to be used in navigating the waters of this State, shall be subject to a lien thereon: first, for all debts contracted by the owner or part owner, master, agent, clerk, steward of such craft, on account of supplies and provisions furnished for the use of such water craft." The lien given by this statute is maritime in its nature, because the contract out of which it springs is maritime, and as such is subject to the limitations of the general maritime law. It, therefore, does not attach unless the supplies were furnished on the credit of the vessel: "The Samuel Marshall," Circuit Court of Appeals of the United States, Sixth Circuit, TAFT, J., February 6, 1893, 54 Fed. Rep., 396.

2. *Maritime Liens Under State Statutes—Mortgage of Vessel—Priority.*

A claim arising under a mortgage of a vessel is not superior to a lien under Rev. St. Ill., 1874, c. 12, § 1, for supplies and necessaries to the vessel in her home port in the State of Illinois, although they were furnished after the mortgage was recorded in conformity with Rev. St. U. S., § 4192: "The J. E. Rumbell," Supreme Court of United States, GRAY, J., March 6, 1893, 13 Sup. Ct. Rep., 498.

COMMERCIAL LAW.

Cases selected by FRANCIS H. BOHLEN.

BILLS AND NOTES.

1. *Check Payable to Fictitious Payee—Certification—Rights of Bona Fide Holder.*

Where a check is drawn, payable to a person under a fictitious name, in payment for property which it afterward appears he has stolen, and the bank at which it is payable certifies the check, a bank which subsequently cashes such check, on its being endorsed by the payee with his fictitious name, acquires a valid title thereto, which it can enforce against

the certifying bank; it appearing that, though the payee acted all through under a fictitious name, yet the check was received by the identical person to whom its drawer intended to deliver it, and was by him endorsed in the name in which it was issued to him, and he, as was intended by the drawer, received the benefit of it: Armstrong *v.* Bank, 22 N. E. Rep., 866, 46 Ohio St., 512, distinguished: Bank *v.* Bank, Appellate Court of Indiana, GAVIN, J., February 1, 1893, 33 N. E. Rep., 247.

CONTRACTS OF INFANTS.

2. *Fraudulent Conveyance of Goods Bought—Relief in Equity.*

An infant was in business as a merchant, and bought goods on credit from plaintiffs, who did not know he was an infant. Before the goods were paid for, he mingled them with other goods, so they could not be identified, and fraudulently conveyed the entire stock of goods to his father. *Held*, that after all the goods were sold under attachment it was proper for a court of equity to take charge of the fund realized at such sale, and apply it in payment of plaintiffs' demands against the infant: Evans *v.* Morgan, Supreme Court of Mississippi, COOPER, J., 12 So. Rep., 270.

CONTRACTS OF MARRIED WOMEN.

3. *Confession of Judgment—Pennsylvania "Married Persons' Property Act" of June 3, 1887.*

Both the rights and liabilities of married women in Pennsylvania have been greatly and radically changed and enlarged by the Act of 1887. The authorities which were applicable to questions arising before the passage of that Act are entirely inapplicable now. The judgment of a married woman, which was then presumably void, is now presumably valid. It is no longer necessary to such validity to set out on the record the facts which before the Act were necessary to give the judgment validity.

A married woman has power to confess a judgment for money borrowed to pay off a lien upon her land, where the money is actually used for that purpose. "She could neither use nor enjoy her separate real estate in the same manner as a *feme sole* if she did not possess such power. And if she might make a lawful contract of borrowing for such a purpose, she might be sued thereon, and, of course, might confess a judgment:" Abell *v.* Chaffee, Supreme Court of Pennsylvania, PER CURIAM, April 10, 1893, 154 Pa., 254.

See, also, Adams *v.* Grey, 154 Pa., 258; Milligan *v.* Phipps, 153 Id., 208 (*infra*, 4); Latrobe Association *v.* Fritz, 152 Id., 224; Bauck *v.* Swan, 146 Id., 444; Koechling *v.* Henkel, 144 Id., 215.

In Adams *v.* Grey, 154 Pa., 258, 32 W. N. C., 192 (decided April 17, 1893), it was held error to strike off a judgment, regular on its face, entered on a warrant of attorney, where on a rule to open the judgment it appeared the defendant was a married woman, though the record did not show the coverture. STERRETT, C. J., held a judgment note given by a married woman since June 3, 1887, was presumably valid, and the record need not recite facts which previously were necessary to

sustain such a judgment. A motion to set aside, or strike off, a judgment, must be on the ground of irregularity appearing on the face of the record.

4. *Mechanic's Lien Against Property of Married Woman in Pennsylvania.*

Since the Married Persons' Property Act of June 3, 1887, authorizes a married woman to contract in relation to her separate property as a *feme sole*, to entitle one to enforce a mechanic's lien for the construction of a building on the land of a married woman, it is not necessary to allege coverture, and that such building was necessary for the preservation or enjoyment of the wife's separate estate: Milligan *v.* Phipps, Supreme Court of Pennsylvania, PAXSON, C.J., February 20, 1893, 25 Atl. Rep., 1121; 31 W. N. C., 561; 153 Pa., 208.

PLEDGE OF STOCK BY BROKER.

5. *Notice of Ownership—Power of Attorney in Blank—Conversion.*

The rule that the owner of stock who, by a power of attorney, signed in blank, has conferred upon another all the indicia of ownership, is estopped to assert his title to it as against a third person who has in good faith purchased it for value from the apparent owner, does not obtain where there are circumstances to put such person on inquiry.

Bodmer, a stockbroker in Wilkes-Barre, and defendants, stockbrokers in Philadelphia, were correspondents. Defendants executed orders for Bodmer for the purchase and sale of stocks on the Philadelphia and New York Stock Exchanges, dividing the commissions when the rules did not forbid. There was a private wire between the two offices, which was used in sending quotations and orders. Plaintiff employed Bodmer to purchase through defendants some stock and bonds, which were paid for by plaintiff's check to defendants, and the stock and bonds were sent to Wilkes-Barre. Subsequently plaintiff gave a similar order to Bodmer for other securities, who transmitted it to defendants, sending also the first securities, to which were attached blank transfers signed by plaintiff. These securities were to be held by defendants to secure part of the purchase money on the new order. Defendants credited them in a general account with Bodmer. Before the purchase money had been fully paid defendants failed, and the securities were subsequently sold by them or their receiver. *Held*, in an action for a wrongful conversion of the securities, that there was sufficient evidence to submit to the jury to determine whether defendants had sufficient notice of the real ownership of the securities. The facts that Bodmer was a broker dealing with the defendants for various principals, and that the first securities purchased had been transferred to plaintiff, were sufficient to submit to the jury upon the question of such notice to defendants of title in plaintiff, as would prevent their relying upon the powers of attorney attached to the securities: Wood's Appeal, 92 Pa., 379, considered and distinguished: Ryman *v.* Gerlach & Harjes, Supreme Court of Pennsylvania, DEAN, J. (WILLIAMS and MITCHELL, JJ., dissenting), February 6, 1893, 25 Atl. Rep., 1031; 31 W. N. C., 494; 153 Pa., 197.

TELEGRAPH COMPANIES.

6. *Delay in Delivering Message—Mental Anguish.*

In an action against a telegraph company for delay in delivering a message to a mother to come to her sick son, by reason of which she did not reach him until after his death, it is not improper to allege that the son frequently called for her, and asked that she be brought to him, since her mental anguish might be increased by the knowledge that he wished to see her, and could not: W. U. Tel. Co. *v.* Evans, Texas Civil Court of Appeals, HEAD, J., November 1, 1892, 21 S. W. Rep., 226. But see Tel. Co. *v.* Cornwell, 31 Pac. Rep., 393, 32 Am. Law Reg. and Rev., (January, 1893), 80, and note.

CONSTITUTIONAL LAW.

Cases selected by WILLIAM STRUTHERS ELLIS.

CLASS LEGISLATION.

1. *Regulation of Attorney's Fee in Suits Against Railroads for Killing Live Stock.*

A State statute which allows a recovery of an attorney's fee not exceeding ten dollars in actions against railroads for live stock killed on the track where plaintiff is successful and his demand does not exceed fifty dollars, is not unconstitutional as class legislation. It does not discriminate unjustly against railroad companies, as it operates equally on all companies within the State, and no other occupation is similarly situated. The legislature has the right to classify the citizens of the State according to their occupation.

Neither is the Act unconstitutional as a discrimination among litigants, since the legislature has the power to impose fines and forfeitures as a police regulation when it includes all persons within a class upon whom the statute can operate: Gulf, C. & S. F. Rwy. Co. *v.* Ellis, Court of Civil Appeals of Texas, COLLARD, J., March 8, 1893, 21 S. W. Rep., 933.

DUE PROCESS OF LAW.

2. *Exclusion of Chinese.*

The Chinese Exclusion Act of May 5, 1892, which provides for summary proceedings before a commissioner for the deportation of unauthorized persons, is not, by reason of its failure to allow a jury trial, open to the objection that it operates as a denial of due process of law; and such proceedings do constitute due process of law, inasmuch as they are those customarily employed in cases of similar character. "If the process is customary it is that which is due:" *In re* Sing Lee, *In re* Ching Jo, District Court, W. D. Michigan, SEVERENS, D. J., February 28, 1893, 54 Fed. Rep., 334.

EMINENT DOMAIN.

3. *Compensation—Franchises.*

The only power which the United States has to condemn a lock and

dam belonging to a corporation chartered by a State, is derived from the power to regulate commerce between the several States and with foreign nations, and such power must always be subject to the obligation imposed by the Fifth Amendment, to make "just compensation" for private property taken for public use.

A franchise granted by a State to a corporation for collecting tolls on a waterway, which it has improved under the powers of its charter, is a vested right, and if Congress thereafter, by condemnation, takes such improvements, it is bound to make just compensation for the value of the franchise as well as for the physical property taken. The fact that Congress possesses supreme power (as it does in such cases) does not leave a grant of such a franchise by the State to be a mere license which is revoked or annulled when Congress, in the subsequent exercise of its power, takes possession of the improvement: Bridge Co. *v.* U. S., 105 U. S., 470 distinguished: Monongahela Navigation Co. *v.* United States, Supreme Court of United States, BREWER, J., March 27, 1893, 13 Sup. Ct. Rep., 622.

INTERSTATE COMMERCE.

4. *Taxation of Telegraph Companies.*

An ordinance compelling a telegraph company to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys and public places," is a charge in the nature of a rental, and is not a privilege or license tax, which would be invalid as applied to a corporation doing interstate business: 39 Fed. Rep., 59, reversed.

The franchise granted by Act of Congress of July 24, 1866, to any telegraph company, organized under State laws, enabling it to construct, maintain and operate lines of telegraph along any military or post roads of the United States then or thereafter declared such by Act of Congress, gives no unrestricted right to appropriate public property of a State or municipality, but, like any other franchise, it is to be exercised in subordination to public and private rights, and, therefore, is no ground of objection to the imposition by a municipal corporation of a reasonable charge for the use of its streets by the erection of telegraph poles. Such reasonable charge a municipal corporation has the right to impose upon a telegraph company doing interstate business, as compensation for the space occupied in its streets by the telegraph poles; but the reasonableness of any charge thus fixed is a matter for judicial investigation: City of St. Louis *v.* Western Union Telegraph Co., Supreme Court of United States, BREWER, J. (BROWN, J., dissenting), March 6, 1893, 13 Sup. Ct. Rep., 485.

PROCEDURE IN FEDERAL COURTS.

5. *Following State Decisions—Running of Statute of Limitations.*

The settled construction by the highest court of a State of the State Statute of Limitations, will be recognized as a rule of decision by the United States Supreme Court, and the duty of the Court to follow such construction is not affected by the adoption of a different construction of a similar statute in another State: Bauserman *v.* Blunt, Supreme Court of United States, GRAY, J., March 6, 1893, 13 Sup. Ct. Rep., 466.

6. *State Statutes as Rules of Decision—Assignment for Benefit of Creditors.*

A decision of the highest Court of a State as to the construction and effect of a statute of the State regulating assignments for the benefit of creditors, is of controlling authority in the Courts of the United States; it is immaterial that a similar statute is construed differently in another State: May *v.* Tenney, Supreme Court of United States, BREWER, J., March 6, 1893, 13 Sup. Ct. Rep., 491.

7. *State Statutes as Rules of Decision—Enforcement of Bail Bonds in Federal Courts.*

Although under Rev. St., § 1014, all proceedings for holding accused persons to bail to answer before a Federal Court are assimilated to the proceedings in vogue for similar purposes in the State where the proceedings take place, yet in enforcing a forfeited bond taken in a criminal case the United States is not restricted to the remedies provided by the laws of the State, but may proceed according to the Common Law, under which, as modified by Acts of Congress, the Federal Courts proceed in the trial and disposition of criminal cases. Hence a forfeited bond may be proceeded on by a *scire facias* in a particular State, though by the law of that State an independent action is necessary: United States *v.* Insley, Circuit Court of Appeals, Eighth Circuit, THAYER, D. J., February 6, 1893, 54 Fed. Rep., 221.

PUBLIC SCHOOLS.

8. *Taxation—Race—Discrimination.*

The establishment by the legislature of a school exclusively for whites, and the issue of bonds by the town in which said school is located to pay therefor, is not forbidden by a provision in the State Constitution requiring the legislature to maintain a uniform system of free public schools, nor is it in conflict with the provision for equal and uniform taxation, as the local taxation in this case is for local purposes and benefits.

The proviso in the State Constitution inhibiting any distinction among citizens does not prevent legislation making separate provision for the different races in the matter of schools. Such a proviso should not be taken literally. "It is probable that it was a mere platitude, intended to announce the general proposition for legislative observance, that equality and fairness may govern appropriation of public money for public institutions:" Chrisman *v.* Mayor of Brookhaven, Supreme Court of Mississippi, CAMPBELL, C. J., January 30, 1893, 12 So. Rep., 458.

CORPORATIONS.

Cases selected by LEWIS LAWRENCE SMITH.

BENEFICIAL ASSOCIATIONS.

1. *When Not Insurance Companies.*

An association organized not to do business for profit or gain, but to pecuniarily aid the widows, orphans, heirs and devisees of its members,

is not an insurance company and the contracts it issues contracts of insurance, but it is rather of a beneficial or philanthropic character: Northwestern Masonic Aid Association *v.* Jones, Supreme Court of Pennsylvania, THOMPSON, J., April 3, 1893, 26 Atl. Rep., 253; 32 W. N. C., 169; 154 Pa., 99.

CONSOLIDATION.

2. *Liability for Tort of Original Company.*

A corporation into which several railroad companies become merged by consolidation assumes, by implication, all the debts and liabilities of the several companies, and in an action against the consolidated company for personal injuries resulting from the negligence of one of the original companies, plaintiff need not allege nor prove an express assumption of such liability by defendant in the articles of consolidation: Cleveland C. C. & St. L. Ry. Co. *v.* Prewitt, Supreme Court of Indiana, HOWARD, J., February 15, 1893, 33 N. E. Rep., 367.

DISSOLUTION.

3. *Rights of Creditors.*

Where the charter of a corporation provides that notice of a meeting to alter or amend the charter shall be advertised for a stated time, the dissolution of such corporation by its stockholders before the expiration of its charter period is as to existing creditors an alteration of an important character, which cannot be effected at a meeting held without such notice, so as to prevent them from levying an attachment. But neither general creditors, nor creditors with attachments against a corporation, can enjoin the stockholders thereof from dissolving the corporation in the absence of fraud or of damage other than that caused by previous gross mismanagement, and that which will result from the dissolution; Fisk *v.* Railroad Co., 10 Blatchf., 518, distinguished: Cleveland City Forge Iron Co. *v.* Taylor Bros. Iron Works, *et al.*, Circuit Court, Eastern District of Louisiana, BILLINGS, D. J., February 22, 1893, 54 Fed. Rep., 85.

FOREIGN CORPORATIONS.

4. *Domicile.*

A statute of Massachusetts provides that "all personal property within or without the Commonwealth shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May." This does not apply to foreign corporations, as the word "inhabitant" means one whose domicile is in the place referred to, and the domicile of a corporation is in the State of its origin, and it retains that domicile irrespective of the residence of its officers or the place where its business is transacted: Boston Investment Company *v.* City of Boston, Supreme Judicial Court of Massachusetts, KNOWLTON, J., March 7, 1893, 33 N. E. Rep., 580.

INSOLVENCY.

5. *Assets a Trust Fund.*

The Baltimore and Ohio R. R. Co. organized various corporations to

operate a telegraph system, and furnished their entire capital stock. Judgment was obtained against one of these subordinate corporations for breach of contract. The railroad company sold the subordinate company and received all the consideration, and left it insolvent and without assets of any kind. *Held*, that the money realized by the railroad company was impressed with a trust in favor of the judgment creditor of the subordinate corporation, and the company was liable for the claim: Balto. & O. Tel. Co. *v.* Interstate Tel. Co., Circuit Court of Appeals, Fourth Circuit, SIMONTON, J., February 7, 1893, 54 Fed. Rep., 50.

RAILROAD MORTGAGES.

6. *Prior Unsecured Liens.*

While it is true that "if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use" (Burnham *v.* Bowen, 111 U. S., 776), yet a claim for cutting down and clearing away timber from the road for its original construction, cannot be given preference on foreclosure of a prior mortgage on the road. Such debts are supposed to be paid out of the fund arising from the original sale of stock and bonds: Farmers' Loan & Trust Co. *v.* Pine Bluff M. & N. O. Ry. Co., Supreme Court of Arkansas, MARTIN, Special Judge, February 18, 1893, 21 S. W. Rep., 652.

SUBSCRIPTIONS TO STOCK.

7. *Conditions Precedent.*

A prospectus of an opera house company stated that its building was "to be built by a corporation with a capital stock of $20,000, consisting of 1000 shares at $20 per share." The company issued a call on defendant for his subscription to this prospectus, which he failed to pay. It was *held* that it was not a condition precedent to defendant's liability that $20,000 of plaintiff's stock should be first subscribed for: Auburn Opera House, etc., Co. *v.* Hill, Supreme Court of California, PER CURIAM, March 9, 1893, 32 Pac. Rep., 587.

8. *Original and New Stock.*

M. was the owner of eighty-five shares of stock of the Balto. City Pass. Ry. Co., and subscribed to eighty-five shares of new stock that the company was authorized to issue. Before the new stock was paid for, M. died, and her executor sold the original stock to H. This sale carried the right to subscribe to the new stock. H. filed a bill against the company praying that it be required to transfer the new stock and issue a certificate therefor to him, subject to the right of the company to exact payment for the stock. The Court dismissed the bill, holding that an original subscription to stock, before the incorporation of the company, gave the subscriber the rights incident to the holding of stock; but that a subscription to a new issue was a mere contract of the company to enter his name on the stock book, on the one hand, and of the subscriber to pay for the stock on the other, and gave no such rights: Baltimore City Pass. Ry. Co. *v.* Hambleton, Court of Appeals of Maryland, MCSHERRY, J., March 16, 1893, 26 Atl. Rep., 279.

EQUITY.

Cases selected by ROBERT P. BRADFORD.

CREDITORS' BILLS.

1. *When Maintainable—Priorities—State and Federal Practice.*

A creditors' bill to set aside an assignment of all the debtor's property for the benefit of creditors, may be maintained, though plaintiff's claim has not been reduced to judgment, when such claim is recognized and provided for in the deed of assignment, and is not disputed by the pleadings, since it is obvious that a judgment and execution would afford no remedy at all, and that there is no remedy at law: 46 Fed. Rep., 580, affirmed.

The fact that by statute in Virginia a complainant in a creditors' bill obtains priority of payment, does not give him such priority when the suit is brought in the United States Circuit Court within such State: Scott *v.* Neely, 140 U. S., 106, followed: Talby *v.* Curtain, Circuit Court of Appeals, Fourth Circuit, SIMONTON, D. J., February 7, 1893, 54 Fed. Rep., 43.

FRAUD.

2. *Rescission of Contract—Unreasonable Delay.*

Where a party is entitled to rescind a contract on the ground of fraud, he must act promptly, with no vacillation, no unreasonable delay, no attempt to speculate upon his option. He must elect to rescind, and proceed as far as lies in his power to place himself and purchaser in *statu quo*. This is especially true as applied to speculative property which is liable to great fluctuation in value: 49 Fed. Rep., 512, affirmed. Therefore, where the owner of mining property, thinking the same has become exhausted, sells it to one who practises no fraud to obtain it, he cannot maintain a bill to rescind the sale after the lapse of seven years, and after the discovery of additional ores, which enhance the value of the land many fold: Kinne *v.* Webb, Circuit Court of Appeals, Eighth Circuit, SANBORN, Cir. J., February 6, 1893, 54 Fed. Rep., 34.

INJUNCTION.

3. *Dissolution.*

A dissolution, like the granting of injunction, is largely a matter of judicial discretion, which must be determined by the nature of the particular cause under consideration; and while it is a well-settled rule that when the sworn answer fully and unequivocally denies all the material allegations of the complaint upon which the complainant's equities rest, the injunction will be dissolved, yet such rule is not without exception, and a court may, in the exercise of a sound discretion, refuse a dissolution when there is ground for apprehending some irreparable injury or great hardship, if the injunction is dissolved before the hearing of the case upon the merits: Huron Waterworks Co. *v.* Huron, Supreme Court of South Dakota, BENNETT, P. J., March 15, 1893, 54 N. W. Rep., 652.

NUISANCE.

4. *Injunction—Pollution of Stream—Adequate Remedy at Law.*

The discharge of refuse matter from a strawboard factory into a non-navigable river, used by a water company owning land fronting on and extending along said river, as a source of supply for furnishing a city, its inhabitants, and others with water for domestic, manufacturing and other purposes requiring purity of the supply, thereby fouling and polluting such stream, is necessarily a continuing nuisance, for which no plain, adequate, and complete remedy exists at law, and injunction will lie to restrain such discharge.

In such a case plaintiff has not a plain, adequate, and complete remedy at law, so as to oust the circuit court of jurisdiction, by reason of Rev. St., § 723, providing that suits in equity shall not be sustained in the United States courts in cases where such a remedy may be had at law.

The federal courts will enforce, either at law or in equity, according to their nature, any new rights created by State statutes, but their equitable jurisdiction of equitable rights cannot be affected by State statutes making such rights enforceable at law: Indianapolis Water Co. *v.* American Strawboard Co., Circuit Court, District of Indiana, BAKER, D. J., February 6, 1893, 53 Fed. Rep., 970.

PLEADING.

5. *Multifariousness—Demurrer.*

A bill to foreclose four distinct mortgages of different dates, all of which were given by the same person, and are owned by complainant, though they contain different exceptions in favor of a number of different persons, lessees and grantees, all of whom are made defendants, together with others claiming interests in the land, personal judgment being asked only against the mortgagor, is not multifarious. Even if such a bill is multifarious, the mortgagor cannot demur on that ground, since there is no misjoinder of claims as against him, and the rule that, for a misjoinder of defendants, those only can demur who are improperly joined, applies with equal force to a misjoinder of matters: Torrent *v.* Hamilton, Supreme Court of Michigan, MCGRATH, C. J., March 10, 1893, 54 N. W. Rep., 634.

INSURANCE.

Cases selected by HORACE L. CHEVNEY.

FIRE INSURANCE.

1. *Explosion—Liability.*

Where an insurance policy provides that the insurer shall not be liable for loss caused by "explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," no liability exists for damage done by an explosion produced by the ignition of a match in a room filled with illuminating gas, since the explosion of the gas, and not the light-

ing of the match, is the proximate cause of the loss: Heuer *v.* Northwestern Ins. Co., Supreme Court of Illinois, MAGRUDER, J., January 10, 1893, 33 N. E. Rep., 411.

MUTUAL BENEFIT INSURANCE.

2. *Assignment of Certificate—Beneficiaries.*

The Public Statutes of Massachusetts, c. 119, § 167, providing that when a policy of insurance is effected by any person on his own life, for the benefit of his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and representatives of the person effecting the same, does not apply to a certificate issued by a benefit association so as to defeat an assignment of such certificate: Anthony *v.* Massachusetts Ben. Ass'n., Supreme Court of Massachusetts, LATHROP, J., March 3, 1893, 33 N. E. Rep., 557.

3. *Beneficial Associations, When Not Insurance Companies.* See CORPORATIONS, 1.

MUNICIPAL CORPORATIONS AND PUBLIC LAW.

Cases selected by MAYNE R. LONGSTRETH.

CUSTOMS DUTIES.

1. *Breakage on Voyage.*

Window glass, which was in a sound condition when it was shipped, but has been broken on the voyage, so as to be useless, except for re-manufacture, is entitled to free entry under paragraph 500 of the Tariff Act of October 1, 1890, for it is, for tariff purposes, different merchandise from that which was shipped, and not merely damaged merchandise of the same kind: *In re* Bache, Circuit Court, Southern District of New York, COXE, D. J., February 10, 1893, 54 Fed. Rep., 371.

HIGHWAYS.

2. *Adverse Possession—Substitution.*

While the public cannot be ousted by adverse possession of its rights to a highway once dedicated, although obstructed for over one hundred years, yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public; and where a highway has been obstructed, and another way equally convenient has been in use by general and long-continued acquiescence, the latter will be considered as substituted for the original way, which cannot then be re-opened to the injury of the land owner: Almy *v.* Church, Supreme Court of Rhode Island, STINESS, J., February 4, 1893, 26 Atl. Rep., 58.

3. *Railways in Street—Rights of Abutting Owners.*

Where the abutting owners do not own to the middle of the street, the occupation of the street by a railway structure does not result in damage to their property peculiar and different in kind from that suffered by the community in general; for injuries resulting from the careful construction and operation of a railroad on the land of another, are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery: Decker *v.* Evansville Suburban Railway Co., Supreme Court of Indiana, COFFEY, C. J., February 1, 1893, 33 N. E. Rep., 349.

INTOXICATING LIQUORS.

4. *Social Clubs—Sales to Persons not Members.*

Upon the indictment of a member of an incorporated society for selling liquor without a license at the annual picnic of the society, it was *held*, without deciding the question of the right of a society to sell liquors without a license to its members at a profit (as affirmed by the lower court), that if the defendant sold tickets with which liquors could be obtained to persons not members of the society, he was liable: Commonwealth *v.* Loesch, Supreme Court of Pennsylvania, WILLIAMS, J., March 20, 1893; 26 Atl. Rep., 208; 32 W. N. C., 97; 153 Pa., 502. See 31 AM. LAW REG. AND REV., 862, 892.

PLEADING AND PRACTICE.

Cases selected by ARDEMUS STEWART.

PLEADING.

ARBITRATION AND AWARD.

1. *Setting Aside Award on Ground of Fraud.*

Where it is sought to set aside an award of arbitration on the ground of fraud, partiality, and mistake, the facts constituting the objection must be specifically averred—general allegations are not sufficient: Bowden *v.* Crow, Court of Civil Appeals of Texas, HEAD, J., March 2, 1893, 21 S. W. Rep., 612.

DEMURRER.

2. *Sufficiency of.*

A demurrer to an answer containing several paragraphs, setting forth that plaintiff demurs severally to the second, third, and fourth paragraphs thereof for the reason that neither of said paragraphs contains sufficient facts, in law, to constitute a defence to the complaint, is unobjectionable in form, and challenges the sufficiency of each paragraph: Funk *v.* Rentchler, Supreme Court of Indiana, HACKNEY, J., February 18, 1893, 33 N. E. Rep., 364.

PRACTICE.

FEDERAL COURTS.

3. *Costs—Taxation—Witness Fees.*

A party in a federal court can only recover as costs the actual amount of fees paid each witness, and only to the extent of the amount legally due such witness; and where he has paid some witnesses more and some less than their legal fees, the legal fees of all cannot be grouped together o make the sum equal the amount paid to all: Burrow *v.* Kansas City, Ft. S. & M. R. Co., Circuit Court of the Western District of Tennessee, HAMMOND, J., February 27, 1893, 54 Fed. Rep., 278.

4. *Judgment—Res Judicata.*

Where, in a suit in a federal court against a trustee for a discovery and accounting, it appears that the precise questions were presented and adjudicated in prior litigation in the State courts, between the same parties, as to the same subject-matter, and there is no evidence of fraud in procuring the adjudication, the doctrine of *res judicata* applies, and complainant will be denied relief: De Chambrun *v.* Campbell, Circuit Court, Northern District of New York, COREE, Dist. J., February 16, 1893, 54 Fed. Rep., 231.

5. *Removal of Causes—Diverse Citizenship—Procedure—Appeal.*

Under the removal acts, an allegation showing diverse "residence" is not equivalent to an allegation of diverse "citizenship," and is insufficient to show federal jurisdiction: Pennsylvania Co. *v.* Bender, Supreme Court of the United States, BREWER, J., March 20, 1893, 13 Sup. Ct. Rep., 591; S. P., Wolfe *v.* Hartford Life & Annuity Ins. Co., 13 Sup. Ct. Rep., 602.

ISSUE DEVISAVIT VEL NON.

6. *Preliminary Issue to Determine Relationship of Contestant.*

When the petition for an issue *devisavit vel non* alleges that petitioner is son and heir at law of testator, and the answer thereto denies the relationship, or any interest therein of petitioner, and asks an issue in the first instance to determine the petitioner's interest, it is error to deny the latter issue and to grant the former, for, if petitioner fails to maintain his alleged interest, he is not entitled to maintain his petition: Rogers' Estate, Supreme Court of Pennsylvania, WILLIAMS, J., April 3, 1893, 26 Atl. Rep., 225; 32 W. N. C., 176; 154 Pa., 217.

REPLEVIN.

7. *Goods Fraudulently Purchased—Return of Price Paid.*

Replevin may be maintained for the recovery of goods alleged to have been fraudulently obtained under the guise of a contract of sale, without the return, before suit, of money paid as a part of the consideration for the goods: Sisson *v.* Hill, Supreme Court of Rhode Island, MATTESON, C. J., February 25, 1893, 26 Atl. Rep., 196.

RES JUDICATA.

8. *Judgment—Conclusiveness.*

A judgment of the Court of Common Pleas, affirmed by the Supreme

Court on appeal, is conclusive, not only of the matters considered, but those which might have been considered by the exercise of due diligence by the parties in the preparation and trial of the case: Pennock *v.* Kennedy, Supreme Court of Pennsylvania, WILLIAMS, J., March 20, 1893, 26 Atl. Rep., 217; 32 W. N. C., 99; 153 Pa., 579.

SERVICE OF WRIT.

9. *Corporation Officials.*

Where summons is served on a member of a corporation as its president, and he tells the officer that another person is president, as does also the treasurer of the corporation, and service is made on him, the corporation cannot, for the purpose of showing that it was not properly summoned, prove that such person was not its president: Wilson *v.* California Wine Co., Supreme Court of Michigan, LONG, J., March 10, 1893, 52 N. W. Rep., 643.

WRIT OF PROHIBITION.

10. *Levy of Taxes.*

A writ of prohibition will not lie, on the petition of one city, to restrain the levy of taxes for the municipal purposes of another city, from which the former has been severed, since the levy of a tax is not a judicial act: City of Coronado *et al. v.* City of San Diego, Supreme Court of California, GAROUTTE, J., March 2, 1893, 32 Pac. Rep., 518.

PROPERTY.

Cases selected by WILLIAM A. DAVIS.

DEED.

1. *Construction of—Fee Simple.*

A grant to a certain person and his heirs and assigns of the right to build and use a dock on certain land within certain lines, "the above right to include all the rights" of the grantor within those lines, together with all and singular the hereditaments and appurtenances thereunto belonging, etc., does not convey a fee in the land, but only an easement to build and use the dock: Munro *v.* Meesh, Supreme Court of Michigan, GRANT, J., February 10, 1893, 54 N. W. Rep., 290.

2. *Reservation—Railroad.*

A deed of railroad land "reserving and excepting" so many feet wide to be used for a right of way and other railroad purposes, in case the line of said road shall be located on or over the same, does not operate as an exception of the strip from the grant, but merely as a reservation of a right of way or easement in the land, and the title to the whole tract vests in the grantee by virtue of the deed: Biles *v.* Tacoma O. & G. H. R. Co., Supreme Court of Washington, ANDERS, J., January 13, 1893, 32 Pac. Rep., 211.

TORTS.

Cases selected by ALEXANDER DURBIN LAUER.

DEFAMATION.

1. *Libel—What Constitutes—Words Tending to Injure Business.*

A circular letter of and concerning an agent and broker for government supply contractors, composed, published and sent by the secretary of the interior to intending bidders for such supply contracts, and stating that "any interference on the part of W. R. L. [plaintiff], a former chief of the stationery and printing division, with the business in any way, will not be to the interest of any person or firm represented," is capable of a libelous interpretation, and a complaint which properly pleads the same is good as against a demurrer. The question whether the words are defamatory in the sense used is for the jury: Lapham *v.* Noble, United States Circuit Court, S. D. New York, WALLACE, C. J., February 6, 1893, 54 Fed. Rep., 108.

MASTER AND SERVANT.

2. *Liability of Master for Torts of Servant—Excessive Damages.*

It is within the scope of the employment of a salesman left in charge of his employer's store to cause the arrest of a person stealing therefrom, and the employer will be liable for his act in causing the arrest of a customer whom he erroneously suspected of theft. But a verdict awarding plaintiff $750 against the employer was held grossly excessive, as there was no evidence to show that he participated in or approved of the wrongful act of his servant: Staples *v.* Schmid, Supreme Court of Rhode Island, DOUGLAS, J., February 25, 1893, 26 Atl. Rep., 193.

NEGLIGENCE.

3. *Contributory Negligence—Surveyor's Instrument Left in Highway.*

The plaintiffs set up a surveyer's instrument in the roadway of a public street, and left it without any one to look after its safety or to warn persons of its presence. The defendant was driving slowly along the street, looking at some houses on the side of the street, for the roofing of which he had contracted, to see whether the slaters were getting them finished. The street was unobstructed except by the plaintiffs' instrument. The defendant did not see the instrument, and had no reason to expect to encounter an instrument of that or any other character. *Held*, That the plaintiffs were guilty of contributory negligence, and that there was no evidence of negligence on the part of the defendant to go to the jury: State *v.* Lauer, Supreme Court of New Jersey, DEPUE, J., March 20, 1893, 26 Atl. Rep., 180.

TORT-FEASORS.

4. *Contribution Between.*

Where two creditors, acting together, attach and sell goods sold by their debtor to a third person, under an honest belief that such latter sale is fraudulent and void, one of them, after paying a judgment recovered against him by the debtor's vendee for wrongful seizure and sale of the goods, may enforce contribution from the other: Vandiver *v.* Pollak, Supreme Court of Alabama, HEAD, J., January 26, 1893, 12 So. Rep., 473.

WILLS, EXECUTORS AND ADMINISTRATORS.

Cases selected by MAURICE G. BELKNAP.

DESCENT OF REALTY.

1. *Death During Foreclosure of Mortgage—Conversion.*

Where a mortgagor dies after the entry of a decree in foreclosure, but before sale, his interest in land descends as real estate to his widow and heirs, since payment of the amount due on the mortgage and costs at any time before sale was completed would extinguish the power of sale, and thus prevent a conversion: Holden *v.* Dunn, Supreme Court of Illinois, SCHOFIELD, J., January 19, 1893, 33 N. E. Rep., 413.

DOWER.

2. *Abolition by Statute—Effect as to Existing Marriage.*

Dower right during the life of the husband is in no sense an interest in real estate or property of which value can be predicated, and, therefore, when a husband conveyed land without joining his wife in the deed, at a time when a dower right existed, but at the time of his death statute had abolished the right of dower, the widow was held to have no dower in the land conveyed: Richards *v.* Bellingham Bay Land Co., Circuit Court of Appeals, Northern Division of Washington, KNOWLES, J., January 16, 1893, 54 Fed. Rep., 200.

EQUITABLE ELECTION.

3. *One Taking Benefit under a Will Estopped from Asserting Adverse Right.*

An heir or representative, upon whom a benefit is conferred by a will, is put to an equitable election, and must take either under or against the will. If he accept the benefit, he will be required to carry out the provisions of the will. Where, therefore, a devisee claims under a will valid by the laws of Pennsylvania, he cannot deny its operation upon property without the State given to another because the laws operative there require more witnesses than are necessary by the laws of Pennsylvania, without compensating such disappointed devisee: Cummings' Estate, Supreme Court of Pennsylvania, WILLIAMS, J., February 20, 1893, 25 Atl. Rep., 1125; 32 W. N. C., 173; 153 Pa., 397.